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ABSTRACT

In 1997, the U.S. Supreme Court issued its decision in Agostini v. Felton holding that Title I instructional services may be provided in religiously affiliated private schools without violating the Establishment Clause of the First Amendment. The U.S. Department of Education's interpretation and intended enforcement of this ruling are offered here. Using a question-and-answer format, the paper opens with an overview of the Court's decision. Then it provides an outline of the circumstances surrounding the case and the determination that providing Title I services in private schools is constitutional as long as certain safeguards, such as public employees alone serving as Title I instructors and counselors, are in place. The effective date of the decision is provided and how the Court's ruling will affect the location and types of services are likewise discussed. A description of the contacts and activities in private schools, such as whether it is permissible for Title I teachers to use private school facilities other than the Title I classroom, are detailed, followed by an overview of the use and disposal of mobile vans and how capital expense funds will be affected. (RJM)

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ED 417 492

GUIDANCE ON THE SUPREME COURT'S DECISION IN AGOSTINI V. FELTON AND TITLE I (PART A) OF THE ELEMENTARY AND SECONDARY EDUCATION ACT

Office of Elementary and Secondary Education
U.S. Department of Education

July 1997

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INTRODUCTION

On June 23, 1997, the U.S. Supreme Court issued its decision in Agostini v. Felton holding that supplementary instructional services under Part A of Title I of the Elementary and Secondary Education Act (Title I) may be provided in religiously-affiliated private schools (private schools) without violating the Establishment Clause of the First Amendment. In doing so, the Court expressly overruled its 1985 decision in Aguilar v. Felton, 473 U.S. 402 (1985). The full text of the Court's decision may be found on the Internet (at http://supct.law.cornell.edu/supct/html/96-552.ZS.html) and in U.S. Law Week (at 65 U.S.L.W. 4524).

This decision will have a positive impact on Title I services for both public and private school children because it eliminates the legal necessity for costly and often less educationally effective alternative arrangements for delivering Title I services to private school students. Local educational agencies (LEAs) need to consult with representatives of private school children as soon as possible regarding implementation of the Court's decision.

The following guidance reflects the Department's interpretation of the Title I statute and regulations, and the Court's decision in Agostini. The Department will not take any enforcement action against State educational agencies (SEAs) and LEAs if they conform to this guidance.

THE SUPREME COURT'S DECISION

Question 1-What did the Supreme Court decide in Agostini v. Felton?

Answer-The Court decided that Title I instructional services may be provided by public school employees in private schools without violating the Establishment Clause. The Court also overruled a portion of another previous Supreme Court decision--Grand Rapids v. Ball, 473 U.S. 373 (1985)--that involved a state-funded "Shared Time" program under which certain enrichment classes were provided in private schools. The action of the Court regarding Grand Rapids does not directly affect how or where Title I services can be provided for private school children.

Question 2-What were the circumstances under which the Court in Agostini approved Title I instruction in private schools?

Answer-The Court was reviewing the constitutionality of New York City's Title I program as it existed prior to Aguilar and concluded that providing Title I services in private schools was constitutional under the safeguards that existed under that program. These safeguards included:

--only public employees could serve as Title I instructors and counselors;

--assignment of public school personnel to private schools was made without regard to the religious affiliation of the employee;

--all religious symbols were removed from classrooms used for Title I services;

--personnel were instructed to limit their consultations with the regular classroom teacher to discussions concerning mutual concerns regarding the students' education; and

--a publicly employed field supervisor made one unannounced visit to each teacher's classroom each month.

Title I personnel were also given a detailed set of instructions emphasizing the secular purpose of Title I and setting out rules to be followed to ensure that this purpose was not compromised, including that:

--they were public employees and accountable only to their public school supervisors;

--they could teach only students determined to be eligible by public school officials;

--their materials and equipment could only be used in the Title I program;

--they could not engage in team teaching or other cooperative instructional activities with private school personnel; and

--they could not introduce any religious matter into their teaching or become involved in the religious activities of the private school.

(For a more complete discussion of the safeguards in New York City's pre-Aguilar program, see the Court's decision.)

Question 3-Are LEAs required to implement the safeguards that existed in New York City (as set forth in the answer to Question 2 and the Court's decision) in providing Title I instructional services in private schools?

Answer-The Court relied on these safeguards in ruling that Title I instructional services could be provided in private schools without violating the Establishment Clause. While the Court did not say these safeguards are required, they are factors a court is likely to take into account in reviewing the constitutionality of any services in private schools, and the Department strongly encourages LEAs to adopt these or similar safeguards.

EFFECTIVE DATE OF DECISION

Question 4-When can LEAs begin providing Title I instruction in private schools?

Answer-LEAs may begin to provide Title I instruction in private schools immediately. In a very few instances, however, LEAs may be subject to an existing court injunction against this

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practice. In that event, the injunction will need to be lifted by the court before these services can be provided.

LOCATION AND TYPES OF SERVICES

Question 5-Do Title I services have to be provided in private schools?

Answer-No. However, LEAs are required to provide Title I services for private school children that are equitable in comparison to the services and other benefits provided for public school participants and to consult with private school officials on important issues such as the location of any services.

Question 6-Is it permissible to continue to provide Title I services to private school students at neutral sites or at public schools, or through computer-assisted instruction (CAI)?

Answer-Yes. These are all permissible options for providing Title I services, so long as the equitability and consultation requirements are met. The Department expects some LEAs may need a reasonable transition period before Title I services can be provided in private schools.

Question 7-May Title I instructional services be provided in private schools before and after regular school hours and during the summer?

Answer-Yes. These are additional, permissible options for providing services for private school children so long as the equitability and consultation requirements are met. In fact, the Title I statute requires, with respect to public and private school children, that LEAs use effective instructional strategies that give "primary consideration to providing extended learning time." These options may be useful particularly in situations where there is no space available in the private school during the regular school day.

Question 8-Do Title I services for private school children need to be in the same subject areas or grade levels as public school students?

Answer-No. The needs of the private school children determine what Title I services are appropriate. However, because eligibility for services is determined by residence in a participating public school attendance area, private school students being served need to reside in an eligible participating public school attendance area. Therefore, for example, if a public middle school attendance area is not participating in Title I, Title I services may not be provided to private school students in middle school grades who reside in the area.

Question 9-Does space used in private schools for Title I instruction need to be free of any religious symbols?

Answer-In its decision in Agostini, in ruling that Title I instructional services can be provided in

private schools, the Court relied on the safeguards in New York City's pre-Aguilar program, including the fact that the Title I services were provided in space that had no religious symbols. While the Supreme Court did not specifically indicate whether the removal of religious symbols was required, it is a significant factor a court is likely to take into account in reviewing the constitutionality of services in private schools and the Department strongly encourages LEAs to provide Title I instruction in space that is free of any religious symbols.

Question 10-May space used for Title I instruction in a private school be used for non-Title I purposes at other times?

Answer-Yes. The LEA should have the exclusive use and control of the Title I space during the time period in which Title I services are being conducted, but the space may be used for other purposes at other times.

Question 11-May Title I services be provided in the regular private school classrooms through aides or joint teaching efforts?

Answer-The Department recommends that LEAs not provide these types of services. In holding that Title I instruction may be provided in private schools, the Court in Agostini emphasized that the Title I program was totally separate from the private school's educational program and under the sole control of the LEA. Providing Title I instruction as a part of private school classes raises significantly different issues that increase the risk that the services would be held unconstitutional.

Question 12-Are private schools required to make space available in their schools for Title I services?

Answer-No. If space is not available in a private school, or if the private school chooses not to make its facilities available to the LEA for this purpose, Title I services have to be provided in another location. The LEA still has the responsibility of providing equitable Title I services for private school children under these circumstances, although the services would be at a location outside the private school. The extra costs of providing services at a location outside the private school would be taken "off-the-top" of the LEA's Title I allocation before funds are allocated for instructional services for public and private school children (unless the costs are paid from capital expense funds). See the answers to Questions 19 and 21.

CONTACTS AND ACTIVITIES IN PRIVATE SCHOOLS

Question 13-Is it permissible for Title I teachers to use private school facilities other than the Title I classroom, such as the restroom, teachers' lounge, cafeteria, or the parking lot?

Answer-Yes. There is no prohibition against reasonable use of private school facilities by a Title I teacher or other Title I personnel.

Question 14-May Title I teachers and other public school personnel meet or have discussions with private school teachers and administrators?

Answer-Yes. Consultation and communication are essential to implementing an effective Title I program. Therefore, Title I personnel may have necessary discussions or meetings with private school officials concerning the design and development of the Title I program, as well as communications concerning the needs and progress of individual children. (For the Title I requirements regarding consultation with private school officials, see section 1120(b) of the Title I statute.)

USE AND DISPOSAL OF MOBILE VANS

Question 15-What procedures govern the use and disposition of vans purchased with Title I funds that are no longer needed to serve private school children?

Answer-A State's procedures concerning equipment govern the use and disposition of vans purchased with Title I funds that are no longer needed to provide services to private school children. Section 80.32(b) of the Education Department General Administrative Regulations (EDGAR) requires a State to use and dispose of equipment "in accordance with State laws and procedures." 34 C.F.R. 80.32 (b). However, the State may follow as its State procedures the use and disposition provisions in section 80.32 of EDGAR. (For a discussion of these EDGAR procedures, see the answers to Questions 16 and 17.)

Question 16-What can LEAs do with vans that they have used to provide Title I services for private school children?

Answer-LEAs may continue to use vans to provide Title I services for private or public school children. If a State follows EDGAR (section 80.32(c)(1)), vans purchased with Title I funds that are no longer needed for Title I purposes may be used in other activities currently or previously supported by a Federal agency. If a State's procedures permit, LEAs also could use the vans for activities funded from other sources. If the vans are leased with Title I funds (rather than purchased), LEAs should terminate the lease arrangements as soon as possible if the vans are no longer needed for Title I purposes.

Question 17-What happens to the proceeds from the disposition of vans that are no longer needed?

Answer-A State's procedures govern the disposition of equipment purchased with Title I funds, including vans. If a State uses section 80.32(e) of EDGAR as its State procedures, the requirements for disposing of vans depend on their current fair market value. Vans with "a current per-unit fair market value of less than $5,000 may be retained, sold or otherwise disposed of with no further obligation" to this Department. 34 C.F.R. 80.32(e) (1). Vans "with a current per-unit fair market value in excess of $5,000 may be retained or sold and [this Department] shall

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have a right to . . . the current market value or proceeds from sale . . . ." 34 C.F.R. 80.32(e)(2).

If vans were purchased from "regular" Title I funds (i.e., not from capital expense funds), the State may adopt procedures that allow funds obtained in the disposal of the vans to be used in the Title I program in lieu of returning funds to this Department.

Question 18-What can proceeds from the disposal of the vans be used for if the vans were purchased with capital expense funds?

Answer-If an LEA purchased vans from capital expense funds, the State may adopt procedures (in lieu of returning the proceeds to this Department) allowing LEAs to use funds obtained in the disposal of the vans for other capital expenses (see section 200.16(a)(2) of the Title I regulations) or, if the LEA's current needs for capital expenses have been met, as a reimbursement for capital expenses the LEA incurred in prior years for which it has not been reimbursed. Funds considered to be a reimbursement for prior capital expenses must be used for allowable Title I expenditures. The State may also adopt procedures whereby, if funds obtained in the disposal of vans cannot be used for other capital expenses or as a reimbursement for prior capital expenses in a particular LEA, the funds may be reallocated to other LEAs in the State for these same purposes. If there is no need elsewhere in the State for these capital expense funds, they must be returned to this Department for reallocation to other States with capital expense needs.

CAPITAL EXPENSE FUNDS

Question 19-Can Title I capital expense funds continue to be used for the costs of vans and transportation for private school children?

Answer-Yes. The capital expense funds already appropriated by Congress will still be available for these purposes, including the $41 million that became available on July 1, 1997. Many LEAs will continue to incur capital expenses as a result of the original Aguilar decision during a transition period. (For a description of what costs qualify as capital expenses, see section 200.16(a)(2) of the Title I regulations.) In addition, an LEA may apply for a payment to cover capital expenses it incurred in prior years for which it has not been reimbursed, if the LEA demonstrates that its current needs for capital expenses have been met.

Question 20-Can capital expense funds be used to buy out leases for mobile vans or neutral space, or for other costs relating to terminating arrangements for providing Title I services to private school children outside of their schools?

Answer-Yes. Reasonable and necessary costs of this nature are allowable Title I costs and may be paid for from capital expense funds.

OFF-THE-TOP REQUIREMENT

Question 21-Does the "off-the-top" requirement still apply?

Answer-Yes. Section 200.27 of the Title I regulations requires that LEAs reserve funds as are reasonable and necessary for certain purposes, including administration of programs for public and private school children, before funds are allocated to school attendance areas or schools. Therefore, if an LEA continues to provide Title I services in vans or employs noninstructional technicians in private schools to assist in CAI (and these costs are not paid from capital expense funds), these costs would come "off-the-top" of the LEA's Title I allocation before funds are allocated for instructional services for public and private school children. The Department anticipates, however, that the "off-the-top" costs of providing Title I services for private school children outside their own schools will be reduced greatly as a result of the Court's decision in Agostini.

Question 22-Do the costs of technicians to assist in CAI come "off-the-top" of an LEA's Title I allocation?

Answer-Yes. Technicians perform noninstructional duties such as operating and maintaining CAI equipment and keeping order in the Title I CAI classroom, and therefore these costs are considered administrative costs that come "off-the-top" of the LEA's Title I allocation (unless these costs are paid from capital expense funds) . In light of the Court's decision, however, Title I personnel now may provide instruction in conjunction with CAI in the private schools. The costs of these instructional personnel are not administrative and would not come "off-the-top" of the LEA's Title I allocation. Whether employees should be considered instructional personnel or noninstructional technicians depends on the functions performed by the employees in addition to their job titles or classifications.

SCHOOLWIDE PROGRAMS

Question 23-Can schoolwide programs be operated in private schools?

Answer-No. Schoolwide programs may not be operated in private schools because private schools, as opposed to private school students, are not themselves eligible for Title I services.

NEW PRIVATE SCHOOL CHILDREN

Question 24-Can an LEA serve eligible private school children who previously declined Title I services?

Answer-Yes. An LEA may provide services to these children to the extent possible in the 1997-98 school year, but the LEA will have met its responsibility to offer equitable services to private school children for the upcoming school year if it contacted representatives of these children on a timely basis in the normal course of designing the Title I program for the 1997-98 school year and services were declined. However, we strongly encourage these LEAs to contact representatives of these children to see what arrangements or modifications can be made for the 1997-98 school year and to make those adjustments unless it would seriously disrupt the already-planned program. With respect to future years, LEAs should make renewed efforts to contact representatives of private school children that may have declined services because they could not be provided in the private school.

OTHER FEDERAL PROGRAMS:

Question 25-Does the Supreme Court's decision in Agostini apply to other Federal education programs?

Answer-The Supreme Court's decision directly dealt with the issue of the constitutionality of providing instructional services under the Title I, Part A program in private schools. However, the implication of the Court's ruling is that there is no constitutional bar to public school employees providing educational services in private schools under other Federal programs under similar circumstances.

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